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14 LLC, and EMPOWERED MEDIA, LLC

15 **UNITED STATES DISTRICT COURT**
16 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

17 LISA FRIEDMAN, individually and on
18 behalf of herself and all others similarly
19 situated,

20 Plaintiffs,

21 vs.

22 JILLIAN MICHAELS, an individual; EM
23 DIGITAL, LLC, a Florida Limited
24 Liability Company; EMPOWERED
25 MEDIA, LLC, a California Limited
26 Liability Company; and DOES 1-100,
27 inclusive,

28 Defendants.

Case No.: 2:18-cv-09414-GW-SS

CLASS ACTION

Honorable George H. Wu

**DEFENDANTS' RESPONSES TO
PLAINTIFF'S EVIDENTIARY
OBJECTIONS TO DEFENDANTS'
EXHIBITS SUBMITTED IN
SUPPORT OF THEIR RESPONSE
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION**

Date: September 16, 2019
Time: 8:30 a.m.

Complaint Filed: August 20, 2018
Removed: November 5, 2018
Trial Date: March 2, 2020

1 Defendants Jillian Michaels, EM Digital, LLC, and Empowered Media, LLC
 2 (collectively “Defendants”) hereby oppose and respond to Plaintiff’s evidentiary
 3 objections and/or motion to strike evidence (D.E. 36-2) submitted by Defendants in
 4 support of their Response in Opposition to Plaintiff’s Motion for Class Certification
 5 (D.E. 33). Plaintiff’s objections are without merit and should be overruled for the
 6 following reasons:

7 **1. To the extent that Plaintiff filed a Motion to Strike, this Court**
 8 **should deny Plaintiff’s Motion to Strike Certain Evidence as it does**
 9 **not comply with Central District of California Local Rule 7-3.**

10 On September 2, 2019, Plaintiff filed Plaintiff’s Evidentiary Objections to
 11 Defendants’ Exhibits Submitted in Support of Their Response in Opposition to
 12 Plaintiff’s Motion for Class Certification. In this filing, Plaintiff “moves to strike . . .
 13 evidence submitted by defendants . . .” (D.E. 36-2 at *2). To the extent that this filing
 14 is a motion to strike, this Court should deny the Motion as it does not comply with
 15 Central District of California Local Rule 7-3. C.D. (Cal. L.R. 7-3.)

16 Central District of California Local Rule 7-3 states that “counsel contemplating
 17 the filing of any motion shall first contact opposing counsel to discuss thoroughly,
 18 preferably in person, the substance of the contemplated motion and any potential
 19 resolution.” *Id.* The rule further states that the conference “shall take place at least
 20 seven (7) days prior to the filing of the motion.” *Id.* If the parties are unable to resolve
 21 their differences, counsel for the moving party must include the following statement
 22 in the notice of motion: “This motion is made following the conference of counsel
 23 pursuant to L.R. 7-3 which took place on (date).” *Id.* In this case, Plaintiff’s motion
 24 to strike did not contain the required statement confirming that a meet-and-confer had
 25 taken place. Further, Plaintiff’s counsel did not request to, nor did they meet or confer
 26 with Defendants’ counsel regarding the motion to strike certain evidence. As such, to
 27 the extent that this filing is a motion to strike any evidence, this Court should deny
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the motion as it does not comply with Central District of California Local Rule 7-3.

**2. Specific Responses to Plaintiff's Objections to Defendants' Exhibits
Submitted in Support of Their Response in Opposition to Plaintiff's
Motion for Class Certification.**

No.	Material Objected to:	Grounds for Objection:	Response:	Ruling:
1.	Exhibit 5: <i>Forbes</i> article titled "Phoney Lawsuits: Attorneys Accused of Racketeering Manufactured Claims"	(1) Relevance; (2) Lacks Foundation; (3) Fed. R. Evid. 801(c) Hearsay and hearsay within hearsay	(1) Defendants challenge that Plaintiff is an adequate class representative due in part to her husband's, attorney Todd Friedman, apparent involvement with this litigation and potential coordination with Plaintiff's counsel in creating this litigation. Evidence turned over on September 10, 2019, by Plaintiff further supports this argument as it reveals that Todd Friedman was the individual who initiated the lawsuit. (<i>See</i> Declaration D. Keith Kelly II, ¶ 2, Ex. 1 – LF 46 – April 16, 2018 email from Todd Friedman to "Paralegal 1" cc John Kristensen – "Please open a class action for lisa and open. John I will need an agreement from your office.") Defendants suspect based on the evidence provided to date that there are an untold number of additional emails between Mr. Friedman and Plaintiff's counsel,	Sustained: _____ Overruled: _____

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relating to this litigation which have not been produced and further support Defendants' theory.

The referenced article is relevant as it discusses other instances in which Todd Friedman has been previously accused of assisting others in filing frivolous litigation. Pursuant to Fed. R. Evid. 401(a), "Evidence is relevant if: it has any tendency to make a fact more or less probable than it would be without the evidence." Here, the evidence presented is relevant as it goes towards the above points and demonstrates that Plaintiff and/or Plaintiff's counsel are not adequate representatives for the class.

(2) Pursuant to Fed. R. Evid. 902(6) Newspapers and Periodicals are deemed self-authenticating. As discussed above, the article is relevant for a number of reasons relating to the adequacy of representation allegations. Last, the foundation for this document was set forth in Defendants' Opposition which further addresses the above adequacy points.

(3) The article is not submitted for the truth of the matter asserted in the article, instead it is submitted to show that an article has been written regarding allegations raised

1			against Attorney Todd Friedman. As such, it is not hearsay as defined by Fed. R. Evid. 801(c)	
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3	2.	Exhibit 6: Eric J. Troutman article titled “Firestarter: TCPA World’s Most Adventurous Frequent Flyer—Todd Friedman—Joins Second Episode of Unpresented Podcast”	(1) Relevance; (2) Lacks Foundation; (3) Fed. R. Evid. 801(c) Hearsay and hearsay within hearsay	Sustained: _____ Overruled: _____
4			(1) Defendants challenge that Plaintiff is an adequate class representative due in part to her husband’s, attorney Todd Friedman, apparent involvement with this litigation and potential coordination with Plaintiff’s counsel in creating this litigation.	
5			Evidence turned over on September 10, 2019 by Plaintiff further supports this argument as it shows that Todd Friedman was the individual who initiated the lawsuit. (<i>See</i> Declaration D. Keith Kelly II, ¶ 2, Ex. 1 – LF 46 – April 16, 2018 email from Todd Friedman to “Paralegal 1” cc John Kristensen – “Please open a class action for lisa and open. John I will need an agreement from your office.”) There are an untold number of emails between Mr. Friedman and Plaintiff’s counsel, a few of which have just been produced.	
6			The referenced article is relevant as it discusses other instances in which Todd Friedman has been previously accused of assisting others in filing frivolous litigation.	
7			Further, this article merely	
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			<p>quotes Todd Friedman during a public interview with the law firm Squire Patton Boggs. The audio from that interview is publicly available at: https://soundcloud.com/user-296303717/episode-2-todd-friedman-atds-definition-willfulness-fcc-developments. Pursuant to Fed. R. Evid. 401(a), “Evidence is relevant if: it has any tendency to make a fact more or less probable than it would be without the evidence.” Here, the evidence presented is relevant as it goes towards the above points and demonstrates that Plaintiff and/or Plaintiff’s counsel are not adequate representatives for the class.</p> <p>(2) Pursuant to Fed. R. Evid. 902(6) Newspapers and Periodicals are deemed self-authenticating. As discussed above, the article is relevant for a number of reasons relating to the adequacy of representation allegations. Last, the foundation for this document was set forth in Defendants’ Opposition which further addresses the above adequacy points.</p> <p>(3) The article is not submitted for the truth of the matter asserted in the article, instead it is submitted to show that an article has been written regarding allegations raised against Attorney Todd</p>	
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			Friedman. As such, it is not hearsay as defined by Fed. R. Evid. 801(c)	
3.	Exhibit 7: Information relating to the My Fitness by Jillian Michaels website, Bates stamped EM 207-224	(1) Has not been authenticated (2) Lacks foundation, (3) Fed. R. Evid. 801(c) Hearsay and Hearsay within Hearsay	(1) Exhibit 7 consists of several screenshots capturing the homepage of www.jillianmichaels.com from March 30, 2017, through July 27, 2019. As evidenced by the screenshots, they were pulled from the “Wayback Machine” located at https://archive.org/web. The Wayback Machine works by crawling over the web with bots that automatically fetch as many pages as they can find and store it all in a searchable public database, effectively snapshotting the world's websites on a given day. A number of California courts have found records generated from the Wayback machine to satisfy the authenticity requirement. <i>See e.g. In re Packaged Seafood Prods. Antitrust Litig.</i> , 338 F. Supp. 3d 1118, 1132 n.8 (S.D. Cal. 2018); <i>See also Larsen v. Vizio, Inc.</i> , No. SACV 14-01865-CJC(JCGx), 2017 U.S. Dist. LEXIS 116195, at *16 (C.D. Cal. June 26, 2017). As further supported by the Supplemental Declaration of	Sustained: Overruled:

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			<p>Kenneth Lancaster, he personally pulled the challenged document from the Wayback Machine for production and can further attest that the document is an accurate representation of the website as of the date pulled based on his personal knowledge. <i>See</i> Supplemental Declaration of Kenneth Lancaster at ¶ 2.</p> <p>(2) Kenneth Lancaster's Supplemental Declaration further supports the foundation of this document as discussed above. Kenneth Lancaster personally pulled these documents from the Wayback Machine and can attest that they are accurate representations of the website at that time based on his personal knowledge. <i>See</i> Supplemental Declaration of Kenneth Lancaster at ¶ 2.</p> <p>(3) As it relates to hearsay, the images in Exhibit 7 are not offered for the truth of the matter asserted in the images, instead they are offered to show what a user would see when viewing the website. <i>See Larsen v. Vizio, Inc.</i>, No. SACV 14-01865-CJC(JCGx),</p>	
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1			2017 U.S. Dist. LEXIS 116195, at *16 (C.D. Cal. June 26, 2017) (“[C]opies of the webpage are not hearsay. [Defendant] is not offering the copies of the webpage for the truth of the matters asserted in them. Rather, [Defendant] is offering the copies of the webpage to show what specific statements the webpage contained.”)	
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10	4.	Exhibit 8: Information relating to the My Fitness by Jillian Michaels website, Bates stamped EM 253-256	(1) Has not been authenticated (2) Lacks foundation, (3) Fed. R. Evid. 801(c) Hearsay and Hearsay within Hearsay	(1) Exhibit 8 consists of several screenshots capturing the homepage of www.jillianmichaels.com on January 4, 2018, and August 24, 2018. As evidenced by the screenshots, they were pulled from the “Wayback Machine.” The Wayback Machine works by crawling over the web with bots that automatically fetch as many pages as they can find and store it all in a searchable public database, effectively snapshotting the world's websites on a given day. A number of California courts have found records generated from the Wayback machine to satisfy the authenticity requirement. <i>See e.g. In re Packaged Seafood Prods. Antitrust Litig.</i> , 338 F. Supp.
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			<p>3d 1118, 1132 n.8 (S.D. Cal. 2018); <i>See also Larsen v. Vizio, Inc.</i>, No. SACV 14-01865-CJC(JCGx), 2017 U.S. Dist. LEXIS 116195, at *16 (C.D. Cal. June 26, 2017). As further supported by the Supplemental Declaration of Kenneth Lancaster, he personally pulled the challenged document from the Wayback Machine for production and can further attest that the document is an accurate representation of the website as of the date pulled based on his personal knowledge. <i>See</i> Supplemental Declaration of Kenneth Lancaster at ¶ 3.</p> <p>(2) Kenneth Lancaster personally pulled these documents from the Wayback Machine and can attest that they are accurate representations of the website at that time based on his personal knowledge. <i>See</i> Supplemental Declaration of Kenneth Lancaster at ¶ 3.</p> <p>(3) As it relates to hearsay, the images in Exhibit 8 are not offered for the truth of the matter asserted in the images, instead they are offered to show what a user would see</p>	
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			when viewing the website. <i>See Larsen v. Vizio, Inc.</i> , No. SACV 14-01865-CJC(JCGx), 2017 U.S. Dist. LEXIS 116195, at *16 (C.D. Cal. June 26, 2017) (“[C]opies of the webpage are not hearsay. [Defendant] is not offering the copies of the webpage for the truth of the matters asserted in them. Rather, [Defendant] is offering the copies of the webpage to show what specific statements the webpage contained.”)	
5.	Exhibit 9: Data relating to Plaintiff’s My Fitness by Michaels account	(1) Has not been authenticated (2) Lacks foundation, (3) Fed. R. Evid. 801(c) Hearsay and Hearsay within Hearsay	(1) Exhibit 9 is the data log file automatically generated by the “My Fitness by Jillian Michaels” system. Data logs are automatically created for each new user account when they sign up for the “My Fitness by Jillian Michaels” service. Exhibit 9 is the data log created by the system for Plaintiff Lisa Friedman. The website tracks various events such as automated emails, user logins, and other various user activity and/or system related logging events. Such events are attached to each corresponding user’s account. As set forth in the Supplemental Declaration of Kenneth Lancaster, Mr. Lancaster personally requested and reviewed the database pull on any recorded system events such as automated email messages, logins, password	Sustained: _____ Overruled: _____

1			resets, and anything else that might have been recorded for Plaintiff's account. <i>See</i> Declaration of Kenneth Lancaster at ¶ 4.	
2			(2) Kenneth Lancaster's Supplemental Declaration further supports the foundation of this document as discussed above. <i>See</i> Supplemental Declaration of Kenneth Lancaster at ¶ 4.	
3			(3) As it relates to hearsay, the images in Exhibit 9 are not offered for the truth of the matter asserted in the images, instead they are offered to show what a user would see when viewing the website. <i>See</i>	
4			<i>Larsen v. Vizio, Inc.</i> , No. SACV 14-01865-CJC(JCGx), 2017 U.S. Dist. LEXIS 116195, at *16 (C.D. Cal. June 26, 2017) ("[C]opies of the webpage are not hearsay. [Defendant] is not offering the copies of the webpage for the truth of the matters asserted in them. Rather, [Defendant] is offering the copies of the webpage to show what specific statements the webpage contained.")	
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23	6.	Exhibit 10: Information relating to the My Fitness by Jillian Michaels Website, Bates stamped EM 276	(1) Has not been authenticated, (2) Lacks foundation, and (3) Fed. R. Evid. 801(c) Hearsay and	(1) Exhibit 10 consists of a screenshot capturing the help page for www.jillianmichaels.com as it appeared on September 8, 2018. As evidenced by the screenshot, it was pulled from
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1		Hearsay within	the “Wayback Machine.” The	—
2		Hearsay	Wayback Machine works by	
3			crawling over the web with	
4			bots that automatically fetch as	
5			many pages as they can find	
6			and store it all in a searchable	
7			public database, effectively	
8			snapshotting the world's	
9			websites on a given day. A	
10			number of California courts	
11			have found records generated	
12			from the Wayback Machine to	
13			satisfy the authenticity	
14			requirement. <i>See e.g. In re</i>	
15			<i>Packaged Seafood Prods.</i>	
16			<i>Antitrust Litig.</i> , 338 F. Supp.	
17			3d 1118, 1132 n.8 (S.D. Cal.	
18			2018); <i>See also Larsen v.</i>	
19			<i>Vizio, Inc.</i> , No. SACV 14-	
20			01865-CJC(JCGx), 2017 U.S.	
21			Dist. LEXIS 116195, at *16	
22			(C.D. Cal. June 26, 2017). As	
23			further supported by the	
24			Supplemental Declaration of	
25			Kenneth Lancaster, he	
26			personally pulled the	
27			challenged document from the	
28			Wayback Machine for	
			production and can further	
			attest that the document is an	
			accurate representation of the	
			website as of the date pulled	
			based on his personal	
			knowledge. <i>See</i> Supplemental	
			Declaration of Kenneth	

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			<p>Lancaster at ¶5.</p> <p>(2) Kenneth Lancaster’s Supplemental Declaration further supports the foundation of this document as discussed above. Kenneth Lancaster personally pulled these documents from the Wayback Machine and can attest that they are accurate representations of the website at that time based on his personal knowledge. <i>See</i> Supplemental Declaration of Kenneth Lancaster at ¶ 5.</p> <p>(3) As it relates to hearsay, the images in Exhibit 10 are not offered for the truth of the matter asserted in the images, instead they are offered to show what a user would see when viewing the website. For the reasons discussed above, images offered to show what a user would see when viewing the website are not hearsay. <i>See Larsen v. Vizio, Inc.</i>, No. SACV 14-01865-CJC(JCGx), 2017 U.S. Dist. LEXIS 116195, at *16 (C.D. Cal. June 26, 2017) (“[C]opies of the webpage are not hearsay. [Defendant] is not offering the copies of the webpage for the truth of the matters asserted in them. Rather, [Defendant] is offering the copies of the webpage to show what specific statements the webpage contained.”)</p>	
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1	7.	Exhibit 11: Information relating to the My Fitness by Jillian Michaels Website, Bates stamped EM 186-189	(1) Has not been authenticated, (2) Lacks foundation, and (3) Hearsay and hearsay within hearsay	(1) Exhibit 11 is a compilation of screenshots pulled from the www.jillianmichaels.com webpage. As set forth in the Supplemental Declaration of Kenneth Lancaster, he personally pulled these screenshots directly from the www.jillianmichaels.com webpage and can attest that they are true and accurate copies of the webpage as of the date they were pulled in 2018. Further, the copy of the email included on page 5, is a true and accurate copy of the welcome email sent to all users. This copy is an example email which Mr. Lancaster generated and sent to Julie White for representation purposes. <i>See</i> Supplemental Declaration of Kenneth Lancaster at ¶ 6. (2) Kenneth Lancaster personally pulled these documents from the MY Fitness by Jillian Michaels website and can attest that they are accurate representations of the website at that time based on his personal knowledge. Further Mr. Lancaster can attest to the accuracy of the email contained on pg. 5. <i>See</i> Supplemental Declaration of Kenneth Lancaster at ¶ 6. (3) As it relates to hearsay, the images in Exhibit 11 are not offered for the truth of the matter asserted in the images,	Sustained: _____ Overruled: _____
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1			instead they are offered to	
2			show what a user would see	
3			when viewing the website at	
4			the time the images were	
5			captured. For the reasons	
6			discussed above, images	
7			offered to show what a user	
8			would see when viewing the	
9			website are not hearsay. <i>See</i>	
10			<i>Larsen v. Vizio, Inc.</i> , No.	
11			SACV 14-01865-CJC(JCGx),	
12			2017 U.S. Dist. LEXIS	
13			116195, at *16 (C.D. Cal. June	
14			26, 2017) (“[C]opies of the	
15			webpage are not hearsay.	
16			[Defendant] is not offering the	
17			copies of the webpage for the	
18			truth of the matters asserted in	
19			them. Rather, [Defendant] is	
20			offering the copies of the	
21			webpage to show what specific	
22			statements the webpage	
23			contained.”) The additional	
24			commentary created by	
25			Kenneth Lancaster merely	
26			serves as a narrative to	
27			highlight the images on the	
28			page.	
8.	Exhibit 12: Information relating to the My Fitness by Jillian Michaels Website, Bates stamped EM 259	(1) Has not been authenticated, (2) Lacks foundation, (3) Hearsay and hearsay within hearsay	(1) Exhibit 12 consists of a screenshot capturing a portion of the www.jillianmichaels.com/app website as of January 5, 2018. As evidenced by the screenshot, it was pulled from the “Wayback Machine.” The Wayback Machine works by crawling over the web with bots that automatically fetch as	Sustained: _____ Overruled: _____

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many pages as they can find and store it all in a searchable public database, effectively snapshotting the world's websites on a given day. A number of California courts have found records generated from the Wayback machine to satisfy the authenticity requirement. *See e.g. In re Packaged Seafood Prods. Antitrust Litig.*, 338 F. Supp. 3d 1118, 1132 n.8 (S.D. Cal. 2018); *See also Larsen v. Vizio, Inc.*, No. SACV 14-01865-CJC(JCGx), 2017 U.S. Dist. LEXIS 116195, at *16 (C.D. Cal. June 26, 2017). As further supported by the Supplemental Declaration of Kenneth Lancaster, he personally pulled the challenged document from the Wayback Machine for production and can further attest that the document is an accurate representation of the website as of the date pulled based on his personal knowledge. *See* Supplemental Declaration of Kenneth Lancaster at ¶ 7.

(2) Kelly's Declaration is sufficient to establish authenticity and foundation as he is a witness with knowledge

1			pursuant to Fed. R. Evid. 901(b)(1). Kenneth Lancaster's Supplemental Declaration further supports the foundation of this document as discussed above. <i>See</i> Supplemental Declaration of Kenneth Lancaster at ¶ 7.	
2			(3) As it relates to hearsay, the images in Exhibit 12 are not offered for the truth of the matter asserted in the images, instead they are offered to show what a user would see when viewing the website. For the reasons discussed above, images offered to show what a user would see when viewing the website are not hearsay. <i>See Larsen v. Vizio, Inc.</i> , No. SACV 14-01865-CJC(JCGx), 2017 U.S. Dist. LEXIS 116195, at *16 (C.D. Cal. June 26, 2017) ("[C]opies of the webpage are not hearsay. [Defendant] is not offering the copies of the webpage for the truth of the matters asserted in them. Rather, [Defendant] is offering the copies of the webpage to show what specific statements the webpage contained.")	
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1 Dated September 12, 2019

Respectfully Submitted,

2 /s/ Richard S. Busch

3 Richard S. Busch

4 Attorney for Defendants

JILLIAN MICHAELS,

5 EM DIGITAL, LLC and

6 EMPOWERED MEDIA, LLC